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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

JAMES A. DOOLEY,
111 West Washington Street,
Chicago 2, Illinois,
STate 2-1453,
Attorney for Petitioner.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago
Telephone: FInancial 6-3988

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 28, 1959.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals on April 28, 1959, appears at 266 F. 2d 196. Much of what is in this opinion is not in the record, as we will demonstrate.

JURISDICTION.

The judgment of the United States Court of Appeals, for the Seventh Circuit was made and entered on April 28, 1959. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether under Section 1404(a), Title 28 U.S.C.A., there can be more than one determination of the proper forum? Specifically, after a motion to transfer was denied in 1954, and after a trial in 1958 which resulted in a disagreement but no change in the factual situation, may another judge to whom the cause is assigned transfer it to a district across the country?

STATUTE INVOLVED.

This case involves 28 USC, Section 1404(a), 62 Stat. 937 (1948) which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

The petitioner on August 18, 1952, lost an eye while in the employ of Chance-Vought Aircraft Corporation in Dallas, Texas, through the explosion of an oxygen generator manufactured by the Bendix Aviation Corporation. The defendant was not then licensed to do business in Texas, nor amenable to service of process there. The plaintiff engaged Texas counsel who found defendant could not be served within that State. On September 28, 1953, he learned that defendant was doing business in California and forwarded the cause to California lawyers who filed suit on December 8, 1953, but defendant pleaded the California one-year statute of limitations and the suit was dismissed.

The present suit was thereupon instituted, on August 3, 1954, in the United States District Court for the Northern District of Illinois, at Chicago. In the meantime the defendant had qualified to do business in Texas.

The defendant filed its answer in the instant case, and later on October 26, 1954, filed a motion to transfer the cause to the District Court in Texas. This motion, after extended hearing, was denied by Judge Hoffman, on whose calendar the case was then pending.

On January 13, 1958, after this case had been pending nearly four years, it was reached for trial before Judge Hoffman. On February 4, 1958, the jury disagreed.

Shortly thereafter, Judge Julius H. Miner was appointed to the district bench and this case was assigned to him for trial. The defendant filed another motion to transfer. It was granted by Judge Miner solely on the basis of the

affidavit and suggestions of the defendant. (There were also counter-affidavits filed.) Defendant's motion raised no new grounds. There was no transcript of testimony of the first trial, and respondent did not know what had occurred there. Nor did defendant even summarize what the witnesses had testified to.

JURISDICTION OF THE DISTRICT COURT.

Federal jurisdiction was originally invoked here on the ground of diversity of citizenship, petitioner being a citizen of Texas and Bendix a citizen of Delaware.

REASONS FOR GRANTING THE WRIT.

(1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same question.* In *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (C.A. 5, 1950), plaintiff filed a FELA suit in the Southern District of New York. The case was transferred to the Southern District of Florida on defendant's motion. There two trials were had, both resulting in disagreements, and plaintiff then made a motion to retransfer the case to the Southern District of New York, which the court granted. The Court of Appeals noted that the statute should be so construed as to authorize *only one determination* of the venue for trial and pointed out the hazards resulting in plural orders of transfer saying, p. 769:

> "Considering section 1404(a), supra, in the light of its purpose and its relation to the doctrine of forum

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* If the order of the Court of Appeals for the Seventh Circuit is permitted to stand, and this case is transferred to Texas, the identical question at issue here will be presented to that court. As we have seen, the rule followed in the Fifth Circuit will require this case to be returned to Illinois for trial. We will then have a situation which may deny petitioner the right to try his case in either forum, resulting from a conflict between circuits *in the same case*. This exact situation is now before this Court in *Blaski* v. *Hoffman*, Cause No. 597 (Opinion below 260 F. 2d 317, (C.A. 7, 1958), in which certiorari has been granted.) See also *Ex Parte Blaski*, 245 F. 2d 737 (C.A. 5, 1957), Cert. den., 355 U.S. 872 (1957). This involves a conflict between the same circuits over Section 1404(a). While it is true, the conflict there does not involve the same question, it demonstrates the disparity in construction of this statute between these same circuits and what that disparity may lead to.

non conveniens, but authorizing transfer rather than dismissal of the suit, it could be reasonably argued that the statute envisions and authorizes, after the plaintiff has made the permissible choice of venue, only one determination thereafter of the venue for trial which will best serve the convenience of parties and witnesses, 'in the interest of justice' and that this determination settles the matter. This application of the statute would remove any possibility of shuttling of the cause or of conflict between the several district courts, each of coordinate jurisdiction, which would arise from plural transfers.''

Here it had been determined in 1955 that the Illinois District Court was the proper forum. That decision settled that issue. It was a judicial act done in the exercise of jurisdiction conferred by law.

If with no change in circumstances there are to be plural transfers under Section 1404(a), no litigant will ever know whether he is secure in the particular forum. With the shuttling of the cause between one district court to the other, as the Fifth Circuit wisely envisioned, remedies or defenses will be expensive and difficult. If such were the fact, the statute which was designed to facilitate the administration of justice would in fact operate as a blockade to intelligent workings of the courts. Here, with no change in the circumstances dictating transfer, it was respondent's judicial obligation to dispose of the cause and not to abdicate that jurisdiction through the vehicle of Section 1404(a).

Moreover, as this Court well appreciates, venue is concerned only with the particular forum where a controversy legally instituted may be determined. Venue is a personal privilege and may be waived. Defendant submitted itself to the Illinois forum to the extent of actually going through a trial. In so acting, it waived whatever

privilege it claimed to litigate the cause elsewhere. (See *Fallbrook Public Utility District* v. *United States District Court*, 202 F. 2d. 942, (C.A. 1953) and *Riley* v. *Union Pac. R. Co.*, 177 F. 2d 673, (C.A. 7, 1950) certiorari denied 338 U.S. 911). This principle of waiver of venue demonstrates how there cannot be plural motions made.

(2) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice.

In this case a petition to transfer, under the provisions of Section 1404(a) of the Judicial Code was filed on October 24, 1954, and denied on October 31, 1955. Thereupon the petitioner proceeded with the necessary preparations for trial, including depositions, interrogatories, pretrial conferences, etc. The case was finally reached on January 13, 1958, and tried, resulting in a disagreement on February 4, 1958. Counsel for the defendant thereupon filed another motion to transfer this case, which motion was granted by another judge, who did not have the record before him.

In the Reviser's Notes to Sec. 1404(a) it is stated that the section "requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The following facts, all uncontroverted and substantiated by oath, demonstrate what injustice is wrought by plural transfers, and how the very purpose of the statute is defeated:

(a) This is not a case of "shopping for a forum." Bendix was not amenable to service of process in the State of Texas at the time of the occurrence. Petitioner filed a suit in California in December 1953, wherein defendant was subject to service of process, but petitioner's claim was defeated by defendant's plea of the one-year California Statute of Limitations; petitioner thereafter brought this suit in Illinois, where defendant was subject to service of process; only after the filing of this suit it developed that the defendant appointed a registered agent in Texas on January 29, 1954.

(b) This case involves an oxygen regulator which is a small circular device approximately five inches high and six inches in diameter. Its function is to regulate the flow of oxygen in a jet plane from the tank to the pilot who inhales it through a mask when flying at high altitudes. Thus there is involved no question of view of the scene.

(c) The Eclipse Pioneer Division of Bendix made this oxygen regulator. At the time the first motion to transfer was denied it was located at Teeterboro, New Jersey, about 825 miles from Chicago and 1600 miles from Dallas, Texas. Subsequent thereto and prior to the trial, the Eclipse Pioneer Division was removed to Davenport, Iowa, approximately 165 miles from Chicago and 635 miles from Dallas, Texas.

(d) The principal witness for Bendix and its only expert was Wesley Sprague, a resident of Davenport, Iowa.

(e) Throughout the trial, Bendix's counsel was assisted by a representative of the Eclipse Pioneer Division of defendant, who was an engineer as well as a lawyer, and he is a resident of Davenport, Iowa.

(f) Petitioner's principal witness was John Trunda, Chief Petty Officer in the United States Navy, with specialized training in oxygen systems and in charge of the maintenance and repair of all oxygen systems at Glenview Naval Air Station, Cook County, Illinois. He not only explained the workings of the regulator system in question, but expressed opinions concerning phases of the operation in question, and particularly the causal relationship between the malfunction of the oxygen regulator manufactured by Bendix and the occurrence in question.

This witness was found only after weeks of intensive research, which revealed that the only sources for an expert in this particular field are: (1) the manufacturer, (2) airplane company employees whose employer uses this particular type of equipment, and (3) United States Naval personnel with specialized training on this type of regulator. In an action against the manufacturer, it is obvious that neither the employees of the manufacturer nor of an airplane company using its equipment would be available to testify.

John Trunda could not go to Dallas, Texas.

(g) Through the consent of Chief Trunda's Commanding Officer, it was possible to produce real evidence in the nature of oxygen regulators of the same character and a diagram approximately three by four feet explaining in detail the operation of the system. These are the property of the United States Navy and were obtained only through Chief Trunda's offices. Inasmuch as neither petitioner nor Bendix, or even Chance-Vought Corporation had possession of a regulator and because such real evidence was necessary for an understanding of the issues, its absence places petitioner at a great disadvantage.

(h) The preparation of this case required one week of intensive study for the lawyer who tried it. That study and that knowledge, as well as the original experience of what occurred at the first trial will be cancelled out by the transfer, since obviously an Illinois lawyer cannot try a case in Texas with any hope for success.

(i) There were three witnesses for Bendix from the State of Texas, each of whom came voluntarily, although one of them had signed an affidavit in connection with the defendant's original motion to transfer to the effect that he would not appear in Chicago for trial. In addition thereto, petitioner used in rebuttal R. C. Carter of Dallas, Texas, who had previously been brought into Chicago by Bendix and released to go home after conferring with defendant's counsel. His testimony that he had been directed to hook up the regulator with the lines crossed after the accident occurred was unimpeached. (The defense was that the lines were crossed and thus the explosion occurred.)

(j) There was no dispute concerning the petitioner's injury, namely, the enucleation of his right eye. His treating doctor gave the only deposition in the case. A Chicago doctor, who examined the man for the purpose of testifying, described his condition and was subjected to no cross examination.

We quote from the opinion of the Court of Appeals:

> "The only other argument of petitioner requiring any discussion is whether the transfer to Dallas would be in the interest of justice. Under this heading is the claim that Chief Petty Officer Trunda cannot attend the trial which will be held in Texas. We doubt that a sufficient showing has been made that Trunda cannot attend any such trial, but assuming such to be a fact, there certainly is no showing that Trunda is the only person who can explain the operation of

an oxygen regulator. Trunda first heard of this case the day before the trial commenced. Trunda undoubtedly has a good working knowledge of the construction and operation of oxygen regulators. He testified he had had two short courses pertaining thereto while in the navy. However, there is no showing he is a highly trained expert.'

"Glenview Naval Air Station is not a major overhaul station for oxygen regulators. There are four such in the country, one being at Corpus Christi, Texas. It is difficult to understand why a satisfactory 'expert' would be available at Glenview and none at a major overhaul station such as Corpus Christi, Texas."

There was neither evidence nor an affidavit:

(a) To controvert Trunda's inability to go to Texas;

(b) To question the difficulty petitioner had in finding experts on oxygen regulators;

(c) To support a statement that Trunda first heard of this case the day before the trial commenced, or that he is not a "highly trained expert"; or

(d) To justify classification of Glenview Naval Air Station as compared to other Naval stations.

It must be remembered that none of the foregoing was before the respondent, and hence not before the Court of Appeals.

Thus it appears that the Court of Appeals decided against petitioner without factual support in the record.

The Court of Appeals for the Seventh Circuit erroneously held that plural motions may be made under Section 1404 (a). The result of this error in interpreting this important federal statute is projected when it is realized that after the case has been pending four years with one

trial, the litigant is thrown into another forum. To allow plural decisions on the propriety of the forum cannot but result in harrassment and oppression, for which this statute was certainly never intended.

The principle involved here transcends this case in importance. Litigants are entitled to a trial in that forum which has once been decided proper.

Before closing, we believe it proper to note that the Court of Appeals for the Seventh Circuit, in *Chicago, R. I. & P. R. Co. v. Igoe*, 220 F. 2d 299, (Pet. for cert. denied, 350 U.S. 822, 1955) held that mandamus was a proper remedy by which to review the action of the trial court in passing upon an application for transfer under Section 1404(a).

CONCLUSION.

The question presented involves not only John Sypert but every litigant in a Federal Court action.

If a litigant never knows, after a decision on a motion under Section 1404(a), whether he is in the proper forum, that statute, instead of facilitating the interests of justice, will become a judicial blockade to the simple and rapid disposition of litigation. But Congress did not intend it as such.

Today, as this Court knows, the delay and expense of obtaining justice is a matter of public concern.

It is respectfully submitted that certiorari be granted so that this problem might be solved.

Respectfully submitted,

JAMES A. DOOLEY,

Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12539 SEPTEMBER TERM, 1958, APRIL SESSION, 1959.

JOHN SYPERT,
Petitioner,

v.

HONORABLE JULIUS H. MINER, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

Petition for Writ of Mandamus

April 28, 1959

Before DUFFY, *Chief Judge*, and PARKINSON and KNOCH, *Circuit Judges.*

DUFFY, *Chief Judge.* This is a petition for a writ of mandamus. Petitioner asks that respondent be directed to vacate and set aside an order in a case which was pending in the United States District Court for the Northern District of Illinois, entitled: "*Johnny Sypert* v. *The Bendix Aviation Corporation*, Civil Action No. 54 C 1112." The order attacked is one whereby the cause was transferred to the United States District Court for the Northern District of Texas at Dallas, Texas.

For a number of years, petitioner has resided and still resides in Dallas, Texas. In 1952 he was employed as an aviation mechanic in the plant of Chance-Vought Aircraft

Corporation in that city. On August 18, 1852, he received injuries while at work which he claims resulted from the explosion of an oxygen regulator manufactured by Eclipse Pioneer Division of defendant corporation. Defendant was organized under the Laws of the State of Delaware.

On December 8, 1953, plaintiff Sypert instituted suit against defendant in the United States District Court for the Northern District of California. After defendant pleaded the one-year California Statute of Limitations, plaintiff dismissed the suit.

On January 29, 1954, defendant received a permit to transact business in the State of Texas, and at the same time appointed a registered agent who resided in Dallas, Texas. More than six months later, on August 3, 1954, plaintiff instituted suit in the United States District Court for the Northern District of Illinois, and the cause was assigned to Honorable Julius J. Hoffman, one of the Judges of that Court.

On October 26, 1954, defendant filed a motion to transfer the cause to the State of Texas pursuant to Title 28 U.S.C.A. §1404(a). Briefs were filed and on October 31, 1955, Judge Hoffman denied the motion to transfer. On January 13, 1958, trial was commenced before Judge Hoffman and the cause was submitted to a jury, but the jury was unable to agree upon a verdict. Thereafter the cause was assigned to the calendar of Honorable Julius H. Miner, the respondent herein.

On March 5, defendant again moved to transfer the cause to the State of Texas. We learn from the motion papers and the record before us that on the trial before Judge Hoffman, seven witnesses testified for plaintiff, five of whom were brought from Texas to Chicago. Four witnesses testified for defendant, three of whom were brought from Texas, and one, defendant's mechanical engineer, resided in Davenport, Iowa. All of the occurrence witnesses reside in Dallas, Texas. The four doctors who treated plaintiff at Baylor Hospital in Dallas, all reside

and have their offices in that city. There is a showing that the testimony of at least one witness who lived in Texas and who could not be present at the Chicago trial, was offered by deposition. Defendant also claims that testimony of certain prospective witnesses was not presented at the trial because their presence could not be compelled in Chicago; also that certain documents and reports are available and subject to subpoena in Dallas. Both sides agree that substantive Texas law must be applied.

Plaintiff, the petitioner herein, strongly objects to the transfer, claiming that plaintiff would have to engage a Texas attorney "who would be without the benefit of the technical knowledge necessary to present the case, and who would likewise be without first hand knowledge of what had occurred at the first trial." However, plaintiff's principal objection seems to be that an expert witness who testified at the trial cannot go to Texas. This witness is Chief Petty Officer John Trunda who is stationed at the Naval Air Station at Glenview, Illinois. Just why Trunda cannot attend the trial in Texas is not explained. The claim is also made that Trunda's commanding officer permitted two oxygen regulators to be used at the trial for demonstration purposes.

In the court below, petitioner argued that Judge Hoffman's denial of a motion to transfer the cause to the United States District Court at Dallas, Texas, prevented Judge Miner from entering an order granting the transfer because of the doctrine of *res judicata*. On this appeal, petitioner does not use the words "*res judicata*" but does raise the question whether in a multi-judge court after one judge has denied a motion to transfer, another judge in the same court may thereafter order a transfer.

Implicit in the doctrine of *res judicata* is a final judgment. In the case at bar no final judgment has been entered. We hold Judge Miner had the power and the right to entertain the second motion for transfer.

Considerable emphasis is given by respondent to the fact that in another case, Judge Hoffman stated from the bench that he had made a mistake in denying the motion to transfer in the instant case. It may be a matter of interest that Judge Hoffman has changed his view. However, we are certain that when Judge Hoffman declined to enter the order, he was of the opinion he had sufficient grounds for so doing. Therefore, we give no effect one way or the other to the fact that the Judge may have since changed his mind.

Petitioner points out that the affidavit submitted by defendant's attorney did not list the witnesses or state the testimony that such witnesses would give. Petitioner cites *General Portland Cement Co.* v. *Perry*, 7 Cir., 204 F. 2d 316. That case is not applicable here. In the case at bar a trial had already been held and it is a fair inference that the principal witnesses who testified at the first trial would also give testimony in the second. The records of the District Court revealed the names of the numerous witnesses who resided in Dallas.

Both sides cite *Chicago, Rock Island and Pacific R.R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299. In that case we discussed in some detail the three factors prescribed by Title 28 U.S.C.A. §1404(a) which a trial court must consider on motions to transfer a cause. These are 1) the convenience of the parties; 2) the convenience of the witnesses; and 3) the interest of justice.

In spite of the arguments of plaintiff's trial counsel who lives in Chicago, the convenience of the parties and the convenience of the witnesses will best be served by a trial at Dallas, Texas. The only one who might be inconvenienced is plaintiff's Chicago counsel, and that is not a controlling factor. There are no controverted questions in this case which depend upon any event occurring in the Northern District of Illinois.

(Appendix)

The only other argument of petitioner requiring any discussion is whether the transfer to Dallas would be in the interest of justice. Under this heading is the claim that Chief Petty Officer Trunda cannot attend the trial which will be held in Texas. We doubt that a sufficient showing has been made that Trunda cannot attend any such trial, but assuming such to be a fact, there certainly is no showing that Trunda is the only person who can explain the operation of an oxygen regulator. Trunda first heard of this case the day before the trial commenced. Trunda undoubtedly has a good working knowledge of the construction and operation of oxygen regulators, He testified he had had two short courses pertaining thereto while in the navy. However, there is no showing he is a "highly trained expert."

Glenview Naval Air Station is not a major overhaul station for oxygen regulators. There are four such in the country, one being at Corpus Christi, Texas. It is difficult to understand why a satisfactory "expert" would be available at Glenview and none at a major overhaul station such as Corpus Christi, Texas.

We note an increased number of petitions for mandamus where contested motions for transfer under §1404(a) are involved. Apparently a number of attorneys are filing petitions for mandamus under circumstances where an appeal might be taken in an ordinary case.

In *Chicago, Rock Island & Pacific R.R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, we pointed out in some detail (page 304) that to warrant action by our Court, in passing on such petitions, something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear. Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion.

(Appendix)

There was no abuse of discretion by Judge Miner in transferring the cause to Dallas, Texas. The petition for mandamus is

DENIED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 246

JOHN SYPERT,

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vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALBERT M. HOWARD,
CHARLES D. SNEWIND,
1 North LaSalle Street,
Chicago 2, Illinois,
DEarborn 2-3709,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1959.

No. 246

JOHN SYPERT,

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vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois Eastern Division,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

The Petitioner's concept of the question presented is predicated upon his assertion that there was "*no change in the factual situation*" after the first Petition under Sec. 1404(a) was filed. This contention is not supported by the record. Both the trial Judge and the Court of Appeals found otherwise. In effect, the Petitioner must necessarily contend that the Trial Court abused his discretion in granting the transfer and that the Court of Appeals abused its discretion in denying the Petition for Mandamus.

STATEMENT OF THE CASE.

The Petitioner's statement of the case is inadequate to present the issues here involved. An accurate statement of the facts upon which the Petition for Transfer was allowed is shown in the following excerpt of the Answer of the trial Judge to the Petition for Mandamus to expunge the order of transfer.

1. The accident occurred on August 18, 1952, in the plant of Chance-Vought Corporation in Dallas, Texas.

2. On said date and prior thereto the Petitioner, John Sypert (Plaintiff in the District Court), was and still is a resident of the City of Dallas in the state aforesaid and the Defendant, Bendix Aviation Corporation, was and still is a corporation duly organized and existing under the laws of the State of Delaware.

3. On September 8, 1953, the Plaintiff, John Sypert instituted suit in the United States District Court for the Northern District of California, which suit was dismissed on January 21, 1954, without prejudice on Plaintiff's Motion.

4. On January 29, 1954, the Defendant, Bendix Aviation Corporation, received a permit to transact business in the State of Texas and at the same time appointed a registered agent who resided in Dallas, Texas, which facts were a matter of public record in the State of Texas.

5. On August 3, 1954, more than 6 months after the appointment of a registered agent in the State of Texas, the Plaintiff instituted suit in the United States District Court of Illinois and thereafter on September 24, 1954, the Defendant filed its answer to said complaint and the cause was assigned to the Honorable Julius J. Hoffman, one of the judges of the United States District Court for the Northern District of Illinois, Eastern Division.

6. On October 26, 1954, the defendant filed a motion to transfer the cause to the State of Texas under Title 28, Section 1404 (a) which motion was supported by affidavit and set forth in substance that the Plaintiff, John Sypert, at that time resided in Dallas, Texas; that the accident occurred in Dallas, Texas; that the Plaintiff was treated at the Baylor Hospital in Dallas, Texas, subsequent to the accident; that he was attended by four or more doctors, all of whom reside in and have their offices in Dallas, Texas; that all of the witnesses to the accident, both for the plaintiff and the defendant, reside in or near Dallas, Texas; that the cost of bringing witnesses to Chicago from Dallas, Texas, would entail great expense as well as loss of time of such witnesses; that the State of Texas being the place of the accident, the laws of that state and not the laws of Illinois would govern the question of liability and that for the convenience of parties and the witnesses and in interest of justice the cause should be transferred to the United States District Court for the Northern District of Texas, Dallas Division.

7. Lengthy briefs and suggestions together with affidavits were filed in support of and in opposition to said motion and thereafter on October 31, 1955, the motion to transfer the case to the State of Texas was denied by the Honorable Julius J. Hoffman.

8. On January 13, 1958, trial was commenced before Hon. Julius J. Hoffman and the cause was submitted to a jury and after a full three weeks of trial, the jury was unable to agree upon a verdict and a mistrial was accordingly declared and the cause was thereafter assigned to the Respondent.

9. On March 15, 1958, the defendant again moved the Court to transfer the cause to the State of Texas under Section 1404 (a) with supporting affidavits and from these affidavits, records before the Court, and the several briefs filed, it appeared that:

(a) Five of the witnesses testifying in the trial resided in Dallas, Texas, at the time of the trial and were transported from Dallas, Texas, to Chicago for the purpose of the trial.

(b) One witness, a Mr. Carter, who testified for the plaintiff on rebuttal was also a resident of Dallas, Texas, and was transported from Dallas to Chicago and returned on two occasions during the trial.

(c) One witness, a physician, who testified for the plaintiff and who first examined him after the trial had commenced, was a resident of Cook County.

(d) The only other witness testifying in behalf of the plaintiff at the trial was Chief Petty Officer John Trunda who was stationed at the Naval Air Station at Glenview, Illinois, and who was first brought into the case by plaintiff's attorney the day before the trial was commenced and who testified to the workings of an oxygen regulator.

(e) Of the four witnesses testifying on behalf of the defense three resided in and were necessarily transported from Dallas, Texas, to Chicago at the time of the trial.

(f) The only other witness testifying in behalf of the defendant was Wesley Sprague, a mechanical engineer, employed by the defendant who was transported from Davenport, Iowa, to Chicago at the time of the trial.

(g) The testimony of several witnesses, all of whom reside in Dallas, Texas, had to be offered by means of deposition.

(h) Other witnesses who resided in Texas did not testify in the trial and could not be brought in by process of this court.

(i) The defendant contended that certain documents, reports and exhibits available and subject to production by Subpoenas in the United States District Court of Dallas, Texas, could not be made

available in this district through lack of process and had to be omitted in the trial.

(j) The facts in the instant motion for transfer were different in many respects from those which arose in the original motion.

(k) It appears that every occurrence witness resides in or near Dallas.

(l) The only witnesses in behalf of either party who did not reside in or near Dallas, Texas, were John Trunda, Chief Petty Officer in the United States Navy, stationed at Glenview, Illinois, Wesley Sprague, a mechanical engineer, who was brought here from Iowa, and an examining physician who examined the plaintiff in Chicago and testified in behalf of the plaintiff.

(m) For a period of more than six months prior to the filing of the action in the United States District Court for the Northern District of Illinois, Eastern Division, the defendant was amenable to service of process in the Texas District, so that at the time of the institution of the action in Illinois there were at least two districts in which the action might have been filed.

(n) The Order of Judge Hoffman denying prior motion for transfer to the State of Texas was not *res judicata*.

(o) The question was not a question of improper venue and the defendant did not waive its right to present a second motion for transfer to the State of Texas where the facts which appear in the trial of the cause established that the cause should have been transferred in the first instance to the United States District Court of Texas for the convenience of the witnesses and in the interest of justice.

(p) There was no showing that the witness, John Trunda, could not conveniently go to Texas if the case was transferred to that district.

(q) It does not appear that expert testimony comparable to the testimony given by John W. Trunda could not be obtained if the case were transferred to Texas as this witness admitted upon cross examination at the trial before the Hon. Judge Hoffman that:

> "The first time he heard of the case and the first time he met the plaintiff or Mr. Dooley or Attorney Wilson was on January 12, 1958, about noon time, Mr. Dooley called John Trunda on the telephone at Glenview, Illinois, and asked if he might come to see him. This was the day that Mr. Sypert * * *, Mr. Dowdy, with plaintiff's attorney, John B. Wilson, arrived by plane from Dallas, Texas, and for the first time discussed with John Trunda at Glenview, oxygen regulators and their operations." (Exhibit 7, page 58).

It also appears from the record that John W. Trunda was not a highly trained expert in the field of oxygen regulators and that he had only two short courses and no instructions on oxygen regulators and their operations.

(r) Glenview Naval Air Station was not a major overhaul station and that only certain adjustments and replacements of parts were permitted to be made at the Glenview Naval Air Station while there were four major overhaul stations of the United States Navy for oxygen regulators. These are located at Corpus Christi, Texas, Pensacola, Florida, San Diego, California, and Quonset Point, Rhode Island. At any one of these four major overhaul stations, oxygen regulators could be completely overhauled, tested and replaced. Certainly at these Naval Air Stations experts could be obtained in the fields of oxygen regulators, and as one of the major "overhaul stations" is located at Corpus Christi, Texas, it would appear that there would not be much difficulty in

obtaining an expert in the same state in which defendant seeks to transfer this lawsuit.

(s) It does not appear in the record that any witness testifying for either party could not be available as a witness in the Texas District.

(t) It was assumed that extensive preparation was required by Mr. Dooley in the preparation for the trial of this cause, but it also appears that the original lawyer for the plaintiff was John B. Wilson, Jr., who is a resident practitioner in the State of Texas; that Mr. Wilson took divers depositions in Texas; is well acquainted with the divers facts as well as the law applicable to this case and is an experienced trial lawyer and was present almost constantly in the trial of this cause in this district and that he still represents the plaintiff.

(u) There being, at the time suit was instituted in Chicago at least two jurisdictions where the defendant was amenable to process the question of transfer rested in the sound discretion of the trial Court.

(v) The court took into consideration the congested condition of the calendar in this district and length of time that would be required before the case could be brought to trial in this district.

REASONS FOR DENYING CERTIORARI.

I.

No Conflicting Question of Federal Law is Involved.

The Petitioner maintains that there is a conflict between the decisions of the Fifth Circuit in the case of *Atlantic Coast Lines* v. *Davis*, 185 F. (2d) 766 and the case at bar. A careful reading of the two cases demonstrates the fallacy of this contention. The *Davis* case came to the United States Court of Appeals on mandamus to require the trial court to expunge an order transferring the case to New York.

In that case Flora Davis, Administratrix, instituted an action in the U. S. District Court for the Southern District of New York based upon F. E. L. A. for injuries to her husband while in the railroad's employ. The Southern District of New York was a permissible venue. Upon a proper motion made by the defendant in the New York Court the case was transferred to the Southern District of Florida. It was there that the fatal injuries were suffered and it was there that all the witnesses resided. Subsequently two trials were held in the Florida District Court, both of which resulted in a mistrial. After the second trial on oral motion of the plaintiff the Court ordered the case back to the District Court of New York, *solely for the reason that there had been two mistrials in the Florida Jurisdiction.*

In the *Davis* case the Court of Appeals held only that the mere fact there had been two mistrials did not justify the court wholly ignoring the convenience of the parties and witnesses and for this reason expunged the order of re-transfer. This is a far cry from the facts in the case at bar, where it clearly appears that the convenience of the parties and the witnesses is the basis for the transfer. It is respectfully submitted that the *Davis* case is entirely without application on this issue.

The case of *Blaski* v. *Hoffman*, 260 F. 2d 317 (CA 7, 1958) and its companion case *Ex Parte Blaski*, 245 F. 2d 737 (CA 5, 1957), cited by the Petitioner, has no bearing whatsoever upon any issue involved in this case. The facts in the *Blaski* case are not comparable to the facts of the case at bar. The decisions in the *Blaski* case were predicated upon conflicting interpretations of Section 1404(a), Title 28 U.S.C.A. The conflict in the opinion was a basic conflict on the law involving the phrase "*where the action could have been brought*". In the instant case that question is not involved.

The case at bar presents no substantial question of Federal law not heretofore determined by this Court. There is no departure from accepted judicial procedure. There is no conflict in the decisions of this Court or any Court of Appeals. No jurisdictional question is involved. Essentially, this case presents questions of fact peculiar to the case at bar which must be left to the sound discretion of the trial court on a Petition to Transfer under Section 1404(a) and to the Court of Appeals in a mandamus action. The question arising under the particular facts in the instant case has no far-reaching implications and to disturb the decision would only encourage "forum shopping" and increase the already over-burdened Federal Courts in this District.

II.

The Denial of the First Motion to Transfer Did Not Bar the Subsequent Motion After a Disagreement.

In the instant case the Defendant moved the Court in ample time before trial to transfer the cause to the Texas District. This motion was denied. After a three-week trial which ended in a disagreement, it became apparent to any disinterested person that a second trial in Illinois would not serve the convenience or the best interest of the parties.

In the trial Court the plaintiff argued that the denial of the defendant's previous motion to transfer this case is *res judicata* and that "*another judge of the same Court cannot reverse and set aside*" *that order.* In this Court he merely substitutes the phrases "abandonment of jurisdiction" and "waiver of venue" for the phrase "*res judicata*". His argument in both instances is equally untenable.

Petitioner's argument on this issue is bottomed on the erroneous contention that there was no "change in circumstances" in the interim between the two petitions. His contention in this regard is negated both by the trial court's finding and the decision of the Appellate Court.

It is well established law that a court may at any time before final judgment reconsider, vacate, and set aside any order made in the proceedings and that the doctrine of *res judicata* is applicable only to final judgments and decrees, and not to interlocutory orders.

In the case of *Goodman* v. *Southern Ry. Co.*, 99 F. Supp. 812, where the first motion for transfer was denied it was held that the defendant could renew its application at a later date. Plaintiff's contention that *res judicata* is applicable is wholly without merit.

In the case of *Levenson* v. *Little*, D.C.N.Y., 81 F. Supp. 103 the Court held that a delay of more than a year in making a motion to transfer the action to another more convenient forum in which it might have been brought originally should not in itself defeat the motion, if it was found to be otherwise well grounded.

In the case of *Schden* v. *Mountain Producers Corporation*, (Del.) 170 F. 2d 707, a stockholder's derivative suit was dismissed on ground of improper venue as to part of the defendants. The court hek that even after remandment it was proper for the district court, under Title 28, Section 1404 (a), in interest of justice, to transfer civil action to any other district where it might have been brought and to permit defendants to amend their motion to transfer under this section.

In the case of *Harwick* v. *Atlantic Coast Line R.R. Co.*, 129 F. Supp. 558, the defendant did not move for a transfer until more than six months after its motion to

dismiss for lack of jurisdiction had been overruled and not held that the delay alone would not require a denial of the motion to transfer.

The cases of *Fallbrook Public Utility Dist. v. U. S. Dist. Ct.* (202 F. 2d 942) and *Riley v. Union Pacific Co.*, 177 F. 2d 673 cited by the petition are not in point and do not support petitioner's contention that the defendant waived its right to renew its motion for a transfer after a three-week trial when the facts disclosed that every fact witness who testified in the case had to be transported from Texas to Chicago.

III.

The Question of a Transfer Under Section 1404(a) Rest in the Sound Discretion of the Trial Court.

The trial court opinion clearly states that the court had before it not only the motions for transfer but also the Court records, the affidavits, and counter affidavits, the several briefs and suggestions of the parties. The Court heard and considered the oral arguments of the parties and various documents, including the depositions filed. Based on these matters the Trial Court found that the case should be transferred for the "convenience of the parties and in furtherance of justice".

The purpose of Section 1404 (a) of the Federal Rules of Civil Procedure is to give the court broader power to transfer to another District than would have been the case under the doctrine of *forum non conveniens*. It was designed, in part, to remedy the evils of "forum shopping," and to afford relief to the defendant by placing him on an equal footing with the plaintiff in the selection of a forum for trial.

Since enactment of Title 28 U.S.C. §1404 (a), the United States Supreme Court has considered a number of cases involving its application. (*Ex parte Collett*, 337 U.S. 55; *Kilpatrick* v. *Texas & Pacific Railway Co.*, 337 U.S. 75; *United States* v. *National City Lines, Inc.*, 337 U.S. 78; *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379; *Norwood* v. *Kirkpatrick*, 349 U.S. 29). The law is well established that the question of transfer under Section 1404 (a) rests in the sound discretion of the trial judge. (*Chicago, Rock Island and Pacific Ry. Co.* v. *Igoe*, 212 F. 2d 378; *All States Freight* v. *Modarelli*, 196 F. 2d 1010).

Petitioner's sole argument is predicated upon the assumption that John W. Trunda, his expert witness, and the only witness residing in Illinois could not attend in Texas. Just why he could not attend is nowhere explained in the record. Trunda admitted, on cross-examination, that the first time he heard of the case was on the day before the trial commenced in Chicago. Trunda was not the highly trained expert in the field of oxygen regulators, as suggested by Petitioner's counsel. The facts are that he had two short courses and no instructions on oxygen regulators while in the Navy. It is also a fact that Glenview Naval Air Station was not a major overhaul station and that only certain adjustments and replacements of parts were permitted to be made at the Glenview Naval Air Station while there were four major overhaul stations of the United States Navy for oxygen regulators. These are located at Corpus Christi, Texas; Pensacola, Florida; San Diego, California; and Quonset, Rhode Island. At any one of these four major overhaul stations, oxygen regulators could be completely overhauled, tested and replaced. Certainly at these Naval Air Stations experts could be obtained in the field of oxygen regulators, and as one of the major "overhaul stations" is located at Corpus Christi, Texas.

The trial court in the instant case was confronted with another long trial in a jurisdiction where the plaintiff is not a resident; where the accident did not occur and where none of the fact witnesses reside. The trial court did not abuse his discretion in allowing the transfer.

IV.

The Court of Appeals Did Not Err in Denying the Petition for Mandamus.

It is well established that Mandamus is an extraordinary remedy. The writ is not awarded as a matter of right. One seeking the writ must show a clear right to it. It should not be awarded in doubtful cases or where the question is one of discretion for the trial court. A Court of Appeals should not award the writ unless there is a clear abuse of discretion.

In the case of *Torres* v. *Walsh*, (CA 2) 221 F. 2d 319, it was held that the Court of Appeals may not consider the question of whether the trial judge abused his discretion under section 1404(a) unless it finds that there is something extraordinary in the case.

In the case of *Great Northern Ry. Co.* v. *Hyde*, (8 Cir.) 245 F. 2d 537, the Court of Appeals held that the power of court of appeals to issue writs did not warrant a writ of mandamus to command a district judge to vacate his order transferring a case from district of Minnesota to northern district of California in which district action could have been brought even though the transfer constituted an erroneous exercise of discretion.

In the case of *Chicago, Rock Island and Pacific Ry. Co.* v. *Igoe*, (7 Cir.) 212 F. 2d 378 at p. 382, the Court in passing upon the prerogative of courts of appeal jurisdictions to pass upon a motion under Section 1404 (a) said:

> "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court."

In mandamus proceedings to compel district judge to grant motion for change of venue under 1404 (a) the judge's statement that he had considered the convenience of parties and witnesses and the interest of justice has been held conclusive on the reviewing court. *Loew's Inc. v. McGuire*, 92 App. DC 319, 205 F. (2d) 719.

CONCLUSION.

For the reasons herein set forth and those expressed by the Court of Appeals in its opinion it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ALBERT M. HOWARD
CHARLES D. SNEWIND
One North LaSalle Street
Chicago 2, Illinois
Attorneys for the Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1959

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

PETITIONER'S REPLY BRIEF

JAMES A. DOOLEY,
111 West Washington Street,
Chicago 2, Illinois,
STate 2-1453,
Attorney for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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PETITIONER'S REPLY BRIEF

Respondent in his answer would treat this matter as if there had been but one order of transfer ordered. The question here is not whether the District Judge properly exercised his discretion, as Respondent would make it appear, or whether the Court of Appeals erred in failing to overrule that discretion. The issue is one never determined by this Court and which should be, if there is to be intelligent implementation of Section 1404(a): That ques-

tion is: Can there be plural orders of transfer even after a trial in the forum once determined to be proper? Specifically, did the Respondent have the power under Section 1404(a) to make a new determination of that issue? Was it intended by Congress that Section 1404(a) provide for multiple determinations of that forum which is "for the convenience of parties and witnesses, in the interest of justice?" If there can be a second determination of the propriety of the forum, so can there be three or four determinations, whether made after a trial resulting in a jury disagreement, or upon the granting of a new trial by the Court on motion after verdict and judgment, or upon the reversal by a Court of Appeals and remandment to the District Court for a new trial. If multiple determinations are permissible, then Section 1404(a) can be employed as a simple expedient of avoiding a judicial obligation as the Fifth Circuit clearly envisioned. (*Atl. Coastline* v. *Davis*, 185 F. 2d 769 (C.A. 5).)

The conflict between the Fifth and Seventh Circuits on this specific issue has a real meaning to this specific case. The cause has been transferred to the Fifth Circuit. A District Judge of the Fifth Circuit or the Fifth Circuit itself can be expected to adhere to its decision in the *Atlantic Coastline* case and order this cause transferred to the United States District Court at Chicago.

Thus, when Respondent states: "In effect, the Petitioner must necessarily contend that the trial court abused his discretion in granting the transfer and that the Court of Appeals abused its discretion in denying the Petition for Mandamus," (p. 1.) he is avoiding the issue here presented.

I.

RESPONDENT'S STATEMENT OF FACTS.

We regret that we must call the Court's attention to certain gross discrepancies in the facts as represented by Respondent, and the Record.

To demonstrate the total lack of factual support for Respondent's Brief, we append a summary of various statements taken from that document contrasted with the record.

Respondent's Statement.	The Record.
(a) Five of the witnesses testifying in the trial resided in Dallas, Texas, at the time of the trial and were transported from Dallas, Texas, to Chicago for the purpose of the trial. (Resp. Brief, p. 4)	Three of the five witnesses, Dowdy, Carter and plaintiff, were brought to Chicago by plaintiff. As to the remaining two, Watson, one of them, in an affidavit supporting defendant's original motion stated: "I would not voluntarily go to Chicago in order to testify in any trial resulting from this accident." Yet he went to Chicago and testified.
(b) One witness, a Mr. Carter, who testified for the plaintiff on rebuttal was also a resident of Dallas, Texas, and was transported from Dallas to Chicago and returned on two occasions during the trial. (Resp. Brief, p. 4)	Carter stated under oath that he had been brought to Chicago by defendant, but not used, and we placed him on the stand.

(d) The only other witness testifying in behalf of the plaintiff at the trial was Chief Petty Officer John Trunda who was stationed at the Naval Air Station at Glenview, Illinois, and who was first brought into the case by plaintiff's attorney the day before the trial was commenced and who testified to the workings of an oxygen regulator. (Resp. Brief, p. 4).	Trunda was in charge of oxygen regulators at Great Lakes. Experts in this field, not employed by aviation companies, are hard to find. Plaintiff did not have the regulator in question, defendant claimed never to have seen it, and Trunda brought into court two regulators and a chart, the property of the U. S. Government, without which no jury could understand the issue.
(g) The testimony of several witnesses, all of whom reside in Dallas, Texas, had to be offered by means of deposition. (Resp. Brief, p. 4).	Only one deposition was read on the trial, that of plaintiff's witness Dr. Grafton. Plaintiff's injuries were not contested.
(h) Other witnesses who resided in Texas did not testify in the trial and could not be brought in by process of this court. (Resp. Brief, p. 4).	This statement has no foundation in the record. At no time during the trial was there any evidence of the omission of testimony.
(i) The defendant contended that certain documents, reports and exhibits available and subject to production by subpoenas in the United States District Court of Dallas, Texas, could not be made available in this district through lack of process and had to be omitted in the trial. (Resp. Brief, p. 4).	This statement has no foundation in the record. At no time in the trial was there any evidence that documents available by subpoena in Texas were wanting.

(j) The facts in the instant motion for transfer were different in many respects from those which arose in the original motion. (Resp. Brief, p. 5).	The facts were more favorable towards leaving the case in Chicago at the time of the second motion. The defendant's principal place of business had been moved from Teterboro, New Jersey, to Davenport, Iowa, only 165 miles from Chicago; defendant's representative at the trial and its principal witness were both from Davenport; plaintiff's principal witness was in Glenview, Illinois, and cannot go to Texas; trial counsel have both familiarized themselves with the case.
(k) It appears that every occurrence witness resides in or near Dallas. (Resp. Brief, p. 5).	The only record before Respondent consisted of affidavits. It is clear from this record that there was only one occurrence witness, Dowdy, who was called by plaintiff. The record demonstrates that the defendant was not deprived of the testimony of any witness.
(p) There was no showing that the witness, John Trunda, could not conveniently go to Texas if the case was transferred to that district. (Resp. Brief, p. 5).	This fact appears under oath; it was not controverted.

(q) It does not appear that expert testimony comparable to the testimony given by John W. Trunda could not be obtained if the case were transferred to Texas as this witness admitted upon cross examination at the trial before the Hon. Judge Hoffman that:

"The first time he heard of the case and the first time he met the plaintiff or Mr. Dooley or Attorney Wilson was on January 12, 1958, about noon time. Mr. Dooley called John Trunda on the telephone at Glenview, Illinois, and asked if he might come to see him. This was the day that Mr. Sypert * * *, Mr. Dowdy, with plaintiff's attorney, John B. Wilson, arrived by plane from Dallas, Texas, and for the first time discussed with John Trunda at Glenview, oxygen regulators and their operations." (Exhibit 7, page 58).

It also appears from the record that John W. Trunda was not a highly trained expert in the field of oxygen regulators and that he had only two short courses and no instructions on oxygen regulators and their operations. (Resp. Brief, p. 6).

These gratuitous statements were not in the record before the Respondent and were not presented under oath.

Thus it appears that the "statement of facts" relied upon by Respondent to justify his order transferring this case is not a statement of facts at all, and lacks support in the record.

II.

Respondent urges that there was a change in circumstances between the time of the two petitions. Under the previous heading, we have shown that the only change was one which should prompt the Chicago court to retain jurisdiction, if that were again debatable. The court did not find that there was any change in circumstances.

This, however, it seems to us, is entirely immaterial. The question of transferring this cause had been argued and decided; relying on the validity of this decision, the Petitioner went to great effort and expense to prove his case. It is now sought to strip him of the fruits of his labor on some fancied doctrine of "convenience". We submit that in simple justice no multiple determination of this question should be permitted.

III.

Respondent here argues as though the question of transfer of the case were being presented for the first time, completely ignoring the fact that the issue had already been decided in favor of Petitioner. The question at this time is not whether the equities would be best served by transferring this case (although on that issue we believe the weight of the evidence lies with Petitioner), but whether multiple determinations of this question can be made. Respondent does not meet this question.

IV.

The question here is not whether the decision of the District Court was such an abuse of discretion as would justify issuance of the writ of mandamus. The question at issue is whether there can be multiple and repeated determinations of the propriety of a transfer of the case. The question is whether, when that issue has been litigated and decided, and the parties have followed and pursued the course of action required by the decision, a court of co-ordinate jurisdiction is authorized to open up the matter and decide it again, in a way contrary to the original decision.

Every case cited by Respondent under this heading has to do with the original determination of the proper forum. In no case was there a multiple finding.

CONCLUSION.

The question at issue here has been raised before and will be met again unless it is settled at this time. It is of great importance that the Court indicate whether, when the question of venue under Section 1404(a) has been decided, that decision is to be final throughout the case.

Respectfully submitted,

JAMES A. DOOLEY,

Attorney for Petitioner.